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No. 06-571

In the Supreme Court of the United States

MICHAEL A. WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's receipt of a firearm in exchange for drugs constituted "use" of a firearm under 18 U.S.C. 924(c)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted in 191 Fed. Appx. 326.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2006. The petition for a writ of certiorari was filed on October 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Louisiana, petitioner was convicted of distributing oxycodone hydrochloride, in violation of 21 U.S.C. 841(a)(1); using a firearm during and in relation to a drug trafficking

crime, in violation of 18 U.S.C. 924(c)(1)(A); and unlawfully possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a. He was sentenced to a total of 262 months of imprisonment. *Id.* at 6a. The court of appeals affirmed. *Id.* at 1a-2a.

1. As stipulated in the plea agreement, in November 2004, law enforcement officers, assisted by an informant, were investigating petitioner's drug trafficking and firearm activities. Pet. App. 8a. Petitioner had previously been convicted of two state felony offenses. *Id.* at 11a. Petitioner told the informant that he wished to purchase a firearm to protect himself against robbers. *Id.* at 9a. When petitioner asked the informant how much the firearm would cost, the informant replied that he did not know, but that his source would be willing to exchange the firearm for drugs. *Ibid.* Petitioner advised the informant that he would be willing to trade drugs for the firearm, and they arranged an exchange. *Ibid.*

On the day of the transaction, the informant and an undercover agent met petitioner outside petitioner's residence. Petitioner exchanged 24 dosage units of oxycodone hydrochloride for a "Desert Eagle" .50 caliber semi-automatic pistol. Pet. App. 9a. After the exchange, agents apprehended petitioner and found the pistol in his vehicle. *Ibid.* Law enforcement officers found additional firearms and controlled substances in a subsequent search of petitioner's residence. *Id.* at 9a-10a. Petitioner informed the agents that he had prescriptions for the controlled substances, and that he sometimes sold his prescribed drugs to raise extra cash. *Id.* at 10a. Petitioner also told the agents that he purchased the Desert Eagle pistol as a means to protect his drugs and his other firearms from theft. *Id.* at 10a-11a.

2. A grand jury in the United States District Court for the Middle District of Louisiana returned a three-count indictment charging petitioner with distributing oxycodone hydrochloride, in violation of 21 U.S.C. 841(a)(1); using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and unlawfully possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a. Petitioner entered a conditional guilty plea based on stipulated facts, retaining his right to challenge the sufficiency of the factual basis for his conviction under Section 924(c)(1)(A). *Id.* at 7a. Section 924(c)(1)(A) imposes specified penalties on "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A).[1] Petitioner was sentenced to a total of 262 months of imprisonment, a term that included a 60-month consecutive sentence for the violation of Section 924(c)(1)(A). Pet. App. 6a.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-2a. Relying on its decisions in *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir.), cert. denied, 513 U.S. 880 (1994), and *United States* v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996), cert. denied, 520 U.S. 1157 (1997), the court rejected petitioner's claim that his trade of a quantity of drugs to an undercover agent in exchange for a handgun did not constitute the "use" of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). The court of appeals concluded that the factors cited by

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[1] Only the "use" provision is directly at issue here. Petitioner was not indicted under the "carry" or "possession" prongs of the statute.

petitioner—that government agents first proposed trading drugs for the handgun, that petitioner controlled the handgun for only moments before his arrest, and that he could not have used the handgun because it was unloaded—were not material to the determination of "use" and did not distinguish *Zuniga* or *Ulloa*. Pet. App. 2a.

ARGUMENT

Petitioner contends (Pet. 7-14) that the court of appeals' opinion conflicts with a decision of this Court and decisions of other courts of appeals on whether obtaining a firearm in exchange for drugs constitutes "use" of a firearm under 18 U.S.C. 924(c)(1)(A). The decision below is correct; it does not conflict with any decision of this Court; and, to the extent that there is a circuit conflict on the issue, it is of minimal continuing importance. Further review of the court of appeals' unpublished per curiam opinion is not warranted.

1. In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court held that a defendant who trades a firearm for drugs "uses" it during and in relation to a drug trafficking offense within the meaning of Section 924(c). The Court reasoned that use of a firearm "as an item of barter fall[s] within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense." *Id.* at 240. In so holding, the Court looked to the manner in which "Congress employed the words 'use' and 'firearm' together * * * in § 924(d)(1), which deals with forfeiture of firearms." *Id.* at 234. The Court observed that Section 924(d) included offenses in which the firearm was used "as an item of barter or commerce," such as, *inter alia*, the "unlicensed receipt of a weapon from outside the State, in violation of § 922(a)(3)." *Id.* at 234 & n.*. In addition, the Court

"[saw] no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity." *Id.* at 240.

The Court reaffirmed *Smith* in *Bailey* v. *United States*, 516 U.S. 137 (1995). *Bailey* held that "use" of a firearm under Section 924(c)(1) means "active employment" of the firearm, such that "the firearm [is] an operative factor in relation to the predicate offense." *Id.* at 143. According to the Court, "Congress intended 'use' in the active sense of 'to avail oneself of.'" *Id.* at 150. The Court made clear that its decision in *Bailey* was "not inconsistent with *Smith*," observing that the "active-employment understanding of 'use' certainly includes," *inter alia*, "bartering," and that "use" encompasses "use as an item of barter." *Id.* at 148.

In light of *Smith* and *Bailey*, the court of appeals correctly affirmed petitioner's conviction. The receipt of a firearm in exchange for drugs constitutes use of the firearm during and in relation to a drug trafficking offense under Section 924(c). As the Eighth Circuit concluded in *United States* v. *Cannon*, 88 F.3d 1495 (1996), the fact "that *Smith* involved a defendant trading a gun for drugs, whereas Defendants in this case traded their drugs for guns," is "a distinction without a difference." *Id.* at 1509. Because selling drugs is as much a drug trafficking crime as buying drugs, and "'use' * * * includes * * * bartering," *Bailey*, 516 U.S. at 148, the conclusion in *Smith* applies equally to both situations. *Cannon*, 88 F.3d at 1509. As the First Circuit has explained, when *Smith* held that the use of a firearm as an "item of barter or commerce" fell within the coverage of

Section 924(c)(1), it "employed a very broad understanding" of the term and the Court's examples "included not only variations on delivery, but also multiple instances of receipt." *United States* v. *Cotto*, 456 F.3d 25, 28 (2006), petition for cert. pending, No. 06-8168 (filed Dec. 5, 2006); see *Cannon*, 88 F.3d at 1509 (noting, as did this Court in *Smith*, that "one 'uses' a firearm under § 924(d)(1) when one 'receives' a firearm in violation of § 922(a)(3)").

Contrary to petitioner's assertion (Pet. 11-14), the decision below is fully consistent with *Bailey*'s "active-employment understanding of 'use.'" 516 U.S. at 148. Petitioner initiated the request for a firearm, and he agreed to provide drugs in exchange for that firearm. Pet. App. 9a. Where a defendant trades drugs for a firearm, and accepts the firearm as a way of closing the drug transaction, "the firearm [is] an operative factor in relation to the predicate offense." *Bailey*, 516 U.S. at 143. Accord *Cotto*, 456 F.3d at 29; *United States* v. *Ulloa*, 94 F.3d 949, 956 (5th Cir. 1996) ("By bartering drugs for firearms, Ulloa 'actively employed' the firearms, because they were an 'operative factor' in the drug trafficking offenses: Ulloa required that he be furnished firearms in exchange for his drugs."), cert. denied, 520 U.S. 1157 (1997). Such a drugs-for-gun trade is a far cry from the "mere possession of a firearm by a person who commits a drug offense" that concerned the Court in *Bailey*. See 516 U.S. at 143.

The court of appeals' decision is also supported by the purpose of Section 924(c)(1)(A). As this Court recognized in *Smith*, when Congress enacted that provision, it "was no doubt aware that drugs and guns are a dangerous combination." 508 U.S. at 240. The Court observed that "[t]he fact that a gun is treated momen-

tarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon." *Ibid.* As the First Circuit has explained, "[t]hat is so whether the defendant transfers or receives the gun." *Cotto*, 456 F.3d at 29.

2. Petitioner correctly notes (Pet. 7-10) that the courts of appeals disagree on whether trading drugs for a firearm constitutes the "use" of a firearm within the meaning of Section 924(c)(1)(A). In accordance with the decision here and the First and Eighth Circuit decisions cited above, the Third, Fourth, and Ninth Circuits have held that the trading of drugs for firearms is such use. See *United States* v. *Sumler*, 294 F.3d 579, 581-583 (3d Cir. 2002), cert. denied, 537 U.S. 1196 (2003); *United States* v. *Harris*, 39 F.3d 1262, 1269 (4th Cir. 1994) (supplying someone with drugs in exchange for aid in obtaining a firearm constitutes "use"); *United States* v. *Belcher*, No. 98-4845, 1999 WL 1080103, *1 & n.* (4th Cir. Nov. 29, 1999) (201 F.3d 437 (Table)) (per curiam) (holding that "[a]n exchange of drugs for guns constitutes 'use'"), cert. denied, 529 U.S. 1032 (2000); *United States* v. *Ramirez-Rangel*, 103 F.3d 1501, 1506 (9th Cir. 1997); cf. *United States* v. *Cox*, 324 F.3d 77, 84 (2d Cir.) (receiving drug purchaser's firearm as "collateral to secure future payment" constitutes active use during and in relation to a drug trafficking offense), cert. denied, 540 U.S. 854 and 859 (2003). A minority of circuits have concluded that a defendant does not "use" a firearm under Section 924(c)(1) when he receives it in exchange for drugs. See *United States* v. *Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005); *United States* v. *Stewart*, 246 F.3d 728, 731-732 (D.C. Cir. 2001); *United States* v. *Warwick*, 167 F.3d 965, 975-976 (6th Cir.), cert. denied, 526 U.S.

1151 (1999); *United States* v. *Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997).[2] For the reasons discussed above, the view of the majority of the circuits is correct.

In any event, the disagreement in the courts of appeals does not warrant this Court's review because a post-*Bailey* amendment to Section 924(c)(1) diminishes the practical significance of the issue. The version of Section 924(c)(1) in effect at the time *Bailey* was decided in 1995 encompassed any person who, "during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm." *Bailey*, 516 U.S. at 143 (quoting 18 U.S.C. 924(c)(1) (1994)). Congress extended the reach of Section 924(c)(1) in 1998 to prohibit not only the use or carrying of a firearm during and in relation to a drug trafficking crime, but also the *possession* of a firearm "in furtherance of a * * * drug trafficking crime." See Act of Nov. 13, 1998, Pub. L. No. 105-368, § 1(a)(1), 112 Stat. 3469. As a result, even in circuits that have held that obtaining firearms in exchange for drugs is not "use" in violation of Section 924(c)(1), an individual who trades drugs for firearms will generally be subject to prosecution and punishment

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[2] Two of those decisions, however, suggest that they are limited to their facts. See *Warwick*, 167 F.3d at 976 (holding that the defendant's "passive acceptance" of a gun from an undercover agent in exchange for drugs did not constitute "use," and distinguishing cases from other circuits where "the defendant was the one who actively devised the plan of providing drugs in exchange for firearms"); *Westmoreland*, 122 F.3d at 436 & n.1 (rejecting "use" "[w]here the defendant does nothing more than receive the gun in payment from a government agent," but suggesting that "[w]e might well have a different case had the transaction occurred between two defendants instead of between a government agent and a defendant" because the government "could conceivably charge the party receiving the gun with aiding and abetting the party supplying it").

under the amendment to Section 924(c)(1). As the Second Circuit observed in *Cox*, the circuit split on the issue thus "may dissipate without resolution," because "trading drugs for a gun will probably result in such possession" under the amended provision. *Cox*, 324 F.3d at 84 n.2.

That is precisely what has happened in the Sixth Circuit, which has held that "acquisition of a firearm in exchange for drugs is a sufficient 'specific nexus' between the drugs and the guns to constitute possession 'in furtherance of' the drug sale" under the amendment to Section 924(c)(1)(A). *United States* v. *Frederick*, 406 F.3d 754, 764 (2005). The Sixth Circuit explained that, "[a]s a matter of logic, a defendant's willingness to accept possession of a gun as consideration for some drugs he wishes to sell *does* 'promote or facilitate' that illegal sale." *Ibid.*[3] And, although petitioner contends (Pet. 17) that the question presented is "one of immediate and continuing concern in the lower courts," none of the post-amendment cases he cites holds that conduct such as petitioner's is outside the ambit of Section 924(c). See, *e.g.*, *Cotto*, 456 F.3d 27-30; *United States* v. *Sanchez*, No. 2:05CR205 TS, 2006 WL 472739, *1 (D. Utah Feb. 27, 2006) (unpublished) (holding that "trading drugs for a gun does constitute 'use' under § 924(c)");

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[3] Petitioner makes much (Pet. 14-16) of the fact that Congress extended the reach of the statute by adding a further prohibition instead of by revising this Court's interpretation of the term "use." As noted above, however, petitioner's conduct falls squarely within this Court's definition of "use." In any event, the amendment diminishes the need for this Court's review of the disagreement among the circuits about the scope of "use" in this context, because the possession amendment allows the fact-pattern presented in this case to be prosecuted in all circuits.

United States v. *Trotter*, No. CRIM.A.04-20140-02, 2005 WL 2239479, *3-*4 (D. Kan. Sept. 14, 2005) (unpublished) (holding, in the alternative, that the government presented sufficient evidence to support a conviction under either the "possession in furtherance of a drug trafficking offense" or the "use" prongs of Section 924(c)).[4]

Finally, even before the amendment to Section 924(c), there was little practical significance to the distinction between exchanging firearms for drugs and exchanging drugs for firearms. At least where the individual who supplies the drugs is not a government agent, the government generally could "charge the party receiving the gun with aiding and abetting the party supplying it." *Westmoreland*, 122 F.3d at 436 n.1. See *United States* v. *Price*, 76 F.3d 526, 529 (3d Cir. 1996) (explaining that 18 U.S.C. 2 "has been routinely applied in conjunction with section 924(c) to convict individuals of 'aiding and abetting in using and carrying a firearm'") (citing cases); *United States* v. *Hornaday*, 392 F.3d 1306, 1311-1314 (11th Cir. 2004) (discussing possible liability for aiding and abetting under 18 U.S.C. 2 for causing a government agent to do an act which would

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[4] In light of the decisions in *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir.), cert. denied, 513 U.S. 880 (1994), and *Ulloa* establishing the Fifth Circuit precedent that petitioner could, in the circumstances here, be charged with using the firearm in violation of Section 924(c)(1), he was not charged under the possession prong of the statute. The record shows that he did, albeit briefly, take possession of the Desert Eagle pistol after the transaction, however, and could have been charged under that prong of Section 924(c)(1). See Pet. App. 2a (noting petitioner's argument that "he controlled the handgun for only moments before his arrest"); *id.* at 9a (arresting agents "found the firearm in the defendant's vehicle").

have been criminal if performed by the defendant), cert. denied, 545 U.S. 1134 (2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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